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Corbin on Contracts

Max Rheinstein

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VOLUME FOUR

PART V: RIGHTS OF THIRD PARTIES—ASSIGNMENT—JOINT AND SEVERAL CONTRACTS §§ 772-942.

PART VI: BREACH OF CONTRACT §§ 943-89.

PROFESSOR CORBIN's treatise is closely but flexibly organized, so that a reviewer must indicate some appreciation of the doctrine as a whole while commenting on any particular part. In another paper, some comments have appeared on interesting portions of the treatment of promises and consideration.¹ Professor Corbin has given an account of the basis of contractual liability, in which the deliberate assurance is contrasted with the mistaken or unconsidered one and the promise is in general emerging from its rigid association, sometimes unjustified by pragmatic standards, with form and consideration.

The present volume deals with those multiple party transactions—third party contracts, assignments, and joint and several contracts—which have traditionally been left to the basic first year contract course, and which are associated with what is thought of as fundamental doctrine. It contains also the opening topic in a five-topic part headed, "Breach of Contract—Judicial Remedies." The opening topic is called "Breach of Contract" and discusses first, some varieties of breach and second, anticipatory repudiation. For all its range, the volume is somehow still a well ordered sequence, related clearly to previous volumes dealing with promises and consideration and to subsequent volumes dealing with such subjects as remedies and discharge.

I

Professor Corbin has long been an advocate of full recognition of the rights of third party beneficiaries. In beginning his treatment of the subject, he observes that his earlier work on these problems has led him to a fuller examination of the evolution of liability than he might otherwise have thought appropriate. As a result, he has included interesting and persuasive chapters on the curious evolution of third party rights in England, where he insists they have more recognition than is commonly supposed, and in American jurisdictions where recognition has been particularly cautious and for a long time partial. There is thus a fascinating story of the growth of one part of the law differently in different jurisdictions, by the curious intuitive processes of cautious extension of responsibility through the use of analogy in response to an undefined and indeed somewhat vague sense of practical utility.

Professor Corbin's statement of the generalizations which can now be made about the rights of third parties in the United States is intelligible and persuasive. When a promisee and a promisor have expressed their understanding about future conduct by the promisor in such a way that a third party who will benefit by performance may reasonably feel a sense of the dependability of

1. Sharp, *Promises, Mistake and Reciprocity*, 19 U. OF CHI. L. REV. 236, 237 n.1, 288 n.2, 292 n.11, 293 n.15 (1952).

their arrangement if he hears about it, then he may recover when he hears about it. The test is much the same as the test for distinguishing between a promise and the communication that is not a promise when the relations between a promisor and a promisee are being considered. If a possible beneficiary were a creditor of the promisee when the promise was made, this circumstance increases the likelihood that he could reasonably depend on the arrangement made. This is particularly true if performance of the promise will discharge the promisee's indebtedness to the third party. The presence of the credit relationship is a motive which makes it reasonable to suppose that the promisee and the promisor understand that the third party is likely to expect to take advantage of the arrangement, and it makes it reasonable for the third party, himself, to expect to do so. The function of the credit relationship is somewhat like the function ascribed to such factors as form and consideration, in systems where the presence or absence of such factors is simply evidence as to the meaning and dependability of communications about future conduct. Somewhat similarly, a donative purpose of the promisee will indicate an understanding that the beneficiary may count on performance; though this proposition, while taken much more easily by students and judges, seems much more problematical, and its results much more startling, than the controlling generalization and the practical results which appear in the case of the creditor beneficiary.

The generalizations in the preceding paragraph are a fair brief paraphrase of the doctrine which Professor Corbin develops much more elaborately in the general portions of his treatment of third party beneficiaries. He also recognizes besides this body of doctrine, similar to that governing the familiar relationships between promisor and promisee, a distinctly procedural influence in the evolution of the third party beneficiary's position. The pioneer case of *Lawrence v. Fox*² brought third party contract law back to the stage which it had reached in the evolution of medieval debt, detinue and account, and which it almost settled down to in 17th Century assumpsit. It is possible that the influence which now effected the change was not so much the analogy to property interests which seems to have played a part in the early law, as a practical intuition about procedure. Speaking of the promisor's obligation, the prevailing opinion observes with emphasis at its close: "No one can doubt that he owes the sum of money demanded of him, or that in accordance with his promise it was his duty to have paid it to the plaintiff; . . . if therefore, it could be shown that a more strict and technical application of the rules applied, would lead to a different result (which I by no means concede), the effort should not be made in the face of manifest justice." This sounds like a reference to the policy against encouraging dilatory defenses implicit in the development of rules limiting the plea of the *jus tertii* in the appropriate common law actions, implicit for example in the well known rule of *Prouty v. Roberts*.³ While Professor Corbin clearly recognizes the influence of some

2. 20 N.Y. 268 (1859).

3. 60 Mass. (6 Cush.) 19 (1850). See BRANNAN, *NEGOTIABLE INSTRUMENTS* 884 *et. seq.* (Beutel ed. 1948).

such factor in the development of the position of the third party beneficiary, the reviewer would like to suggest that it should perhaps be given a somewhat more important place in a full account of the matter.

The course of thinking which a lawyer faced with the decision in *Lawrence v. Fox* might follow, will—however hypothetical its construction—help somewhat to understand the most striking feature of the position of the third party beneficiary in current doctrine. Suppose that a business man in New York in the 1860's asks his lawyer about his rights in a situation where his debtor has secured another person's promise to pay the indebtedness. He will be told that he has now two people against whom he can get judgments instead of one. They look rather like surety and principal debtor. The business man will be correspondingly happy. Suppose that he had been negotiating for collateral with his debtor, now perhaps a surety; and that though the indebtedness had not matured and he had no right to collateral, he had some prospect of getting it because of his debtor's concern with his present and future credit standing. He relaxes in his effort to get collateral, though whether it is because he is somewhat reassured by a slight turn for the better in his original debtor's prospects, or whether it is because he feels better to have two possible obligors where formerly he had one, he may be unable to say or testify himself. He has neither communicated with the promisor nor provably changed his course of business conduct in reliance on the new promise. Yet if the policy governing the rights of a creditor who in good faith receives negotiable instruments before maturity merely as collateral for an existing but unmatured claim is applicable, the creditor may well be protected against a discharge of the promisor by the promisee. It is true that a surety's promise made under comparable circumstances would be unenforceable for lack of consideration. The circumstances indicate at once how sensible, and yet how extraordinary, it is to protect a creditor beneficiary against an agreement by promisee and promisor for discharge of the promisor's obligation.

Professor Corbin, like other writers on the subject, is puzzled by the consequences of this easy step from the beneficiary's remedy in *Lawrence v. Fox* to his well protected right, however uncertain its precise limits may be, under later decisions. Like other writers, he is less puzzled by the somewhat similar right of the donee beneficiary, appearing in a familiar form in the restrictions on the power of the promisee and promisor to affect the interests of the beneficiary of a life insurance policy, in the absence of provisions in the policy giving them such a power. The influence of statutory provisions may explain the early history of the life insurance beneficiary's rights, but they are now treated as representing the application of a general principle. It is said that a gift has been made to the beneficiary. The result may be expressed in these terms, and it has perhaps a remote analogy in the effect of an unsealed written assignment of a simple contract right under modern statutes governing conveyances, or in the relationship between promisee and promisor when someone else has furnished consideration. Each analogy is, however, somewhat remote. When one examines the situation simply,

he finds the promisor under an obligation to the promisee which they might agree on discharging except for some judgment about their responsibility to the beneficiary, to whom the promisee has given no undertaking whatever, and whose rights against the promisor are most accurately described as those of a person to whom there is an executory obligation to effect a gift. The beneficiary's rights are protected even at a time when he or she may know nothing of the existence of the promise. There are perhaps practical justifications for the result, somewhat comparable to those which we have seen at work in case of the creditor beneficiary, though perhaps not quite so persuasive. Nevertheless if one looks at the doctrine in the way that has been suggested, it shows how some of the controlling ideas about consideration applied so rigorously in other parts of contract law, have been dispensed with in the case of third party beneficiaries.

It may be that some of the difficulty which appears in the treatment of third party beneficiaries results from the tension between what may be called the substantive and the procedural factors of the doctrine. Professor Corbin deals skilfully and shrewdly with some of the famous borderline problems. He has a strong and effective argument against the cases denying the liability of a water company, which has agreed with a municipality to maintain pressure, to citizens whose houses are damaged by fire which could have been prevented if the agreed-upon pressure had been maintained. He deals in an interesting way with the problems of the liability of a surety company on an undertaking given to secure a building contractor's obligations to the owner under a construction contract. Subcontractors and material men, with or without liens, have litigated in a great variety of situations the obligations created by an extraordinary variety of bonds. Professor Corbin is satisfied that a bond conditioned on full performance of his contract by the principal, where the contract requires payments to third parties, gives the third parties rights. At the other extreme, he agrees with the cases which deny third parties rights when the surety's undertaking can be understood as one simply to indemnify the owner. Between the extremes, he urges that the tendency is and should be toward increasing protection to subcontractors and material men. On the other hand he is critical of a decision of the Second Circuit Court of Appeals which permitted a shipper to whom seaworthy barges had been promised to recover on a similar undertaking given by the one who undertook to furnish the barges to the shipper's obligor;⁴ and he is conservative about the availability of sellers' warranties to distributors in actions by ultimate buyers.⁵

The principle governing decisions about the rights of third party beneficiaries which was expressed at the beginning of this discussion is framed with reference to that portion of third party beneficiary doctrine which recognizes indefeasible rights in third parties (subject only to defenses and conditions) in circumstances varying somewhat in various jurisdictions. If the third

4. *Davis v. Dittmar*, 6 F.2d 141 (2d Cir. 1925), criticized § 779D, p. 46 n.75.

5. See § 778.

party's interest prevents promisee and promisor from dealing freely with each other, it must indeed be carefully circumscribed. There are, as has been observed, good reasons for protecting the third party against transactions between promisee and promisor under some circumstances. Nevertheless there is no assurance that the resulting limits on the classification of third parties will coincide with the practical limits appropriate for determining who may bring an action when the promisee has given no indication that he wishes to prevent it.

A mature and consistent scheme of third parties' protection might indeed include a recognition that in some cases third parties should have both indefeasible rights (subject only to defenses and conditions) and powers to litigate, while in other cases third parties should have only powers to litigate. The limitations of such powers, and the possible remedies available, would need to be worked out with reference to the position of this class of beneficiaries. Moreover, a consistent system would develop an improvement in remedies to which Professor Corbin does not pay great attention in this part of his treatise. Where the creditor beneficiary has indefeasible rights, the promisee should ordinarily be confined to the remedies of the surety. Where the donee beneficiary has indefeasible rights, it seems likely that the promisee will be increasingly confined to the remedy of specific performance. This is one of those unusual cases, of which another will be discussed in connection with the rights of the insured to recover for permanent total disability, where the availability and peculiar adequacy of the remedy traditionally known as equitable should lead to its substitution, in a modern court, for the traditionally normal remedy known as legal. One feature of the position of the hypothetical beneficiary without indefeasible rights but with a power to litigate will indicate the kind of new problems which he might create. It seems that if notice of their litigation is given by either party to the promisee, in such a case matters decided in it should be *res judicata* in relation to him.⁶

The preoccupation which leads us to treat the position of a third party beneficiary as dependent on the existence of some right which he "possesses," as he might possess land or cattle, may lead us to observe that, like others, lawyers may sometimes be entity bound. We are concerned with some little image reifying a somewhat elusive abstraction, which somehow moves into the third party's control. The image may distract us from practical questions about the human relations with which we are concerned. In some cases the appropriate question may not be whether somehow this entity has passed to the third party, but whether it would not best serve to produce the human advantages which promisee and promisor have provided for, to permit the third party to take advantage of the promisor's undertaking.

II

The tendency to be entity bound expresses itself particularly in multiple party relationships. It is impossible to understand how any lawyer can dis-

6. Compare problems about *res judicata* in relationships resulting from assignment and suretyship. See Note, 15 U. OF CHI. L. REV. 371, 378 n.34 (1948).

regard the corporate entity, but it is also hard to understand how any lawyer could have drawn from his regard for the corporate entity any of those curiously rigid consequences which good courts have found means of avoiding. The development of joint rights and joint duties, now fortunately brought almost to a rational state, is an interesting historical example of entity bound decisions, which can now be looked at with some detachment.

Professor Corbin's treatment of joint rights and joint and several duties is, of course, excellent. He traces the history of the subject as it moves from a rather primitive rigidity toward a scheme of practical adjustment.

Joint rights have created much less difficulty than joint duties. In the case of joint rights the common law rules about discharge and joinder could be developed consistently with developing notions of authority and representation. The common law of survivorship was corrected in the case of joint rights, even more easily and readily than in the case of joint duties, by courts of equity. In both sets of situations, the old difficulties about survivorship have, as Professor Corbin observes with respect to joint duties, "receded into history." The serious inconveniences created by the common law rules governing joinder of joint obligors have been rendered obsolete by modern statutes.

The one vestige of ancient rigidity which still causes trouble is the body of rules controlling the release of joint obligors and, perhaps by historical accident, the release of joint and several obligors as well. There is only one entity, the obligation. For purposes of determining the effect of a release this is somehow true of both the joint and the joint and several obligation. In view of the relative importance of the joint and several obligation under modern statutes it is not only queer but unfortunate that it should be treated for this purpose like a joint obligation.

In the case of either type of obligation, the common law rules are unreasonable and tend to frustrate normal business expectations. Professor Corbin makes a most elaborate and ingenious argument from a wealth of analogies in favor of the application by courts of the general principle and approach to the problem expressed in the Uniform Joint Obligations Act. His argument is convincing. He caps it with what may be taken as an exclamatory reference to common sense principles of objective interpretation (and perhaps to principles of relief for mistake of expression and mistake about the legal effect of language) which puts the matter simply. "A retrospective survey" of some of the opinions on the subject "creates the impression of legalistic verbiage gone mad. How much simpler to hold directly that a release effective as to one obligor does not release the others if the intention not to release them is clear and full satisfaction has not been received!"⁷

III

Professor Corbin's treatment of assignments contains fewer original and striking passages than his treatment of the other topics which have just been

7. § 933, p. 752.

considered. Under this topic, he deals with the history and analysis of assignments, the assignment of rights and delegation of performance, modes of assignment and the assignment of various kinds of rights, defenses and priorities, and finally a chapter devoted to gift assignments. The treatment is full, scholarly, careful and usually convincing. On the other hand there are problems about assignments which seem to the reviewer to need careful and skeptical reconsideration, while Professor Corbin seems relatively well satisfied with this division of the law.

The historical account of assignments deals with the usual theory of a combination of power of attorney and special equitable protection. It seems likely that the late 17th century developments in commercial paper and its legal treatment should be remembered in connection with the contemporaneous development of assignments. A second element in history which could perhaps be more emphasized than has been customary is the circumstance that the typical and earliest enforceable assignment to appear in the equity reports was the assignment for security.

The most troublesome of the problems about acts constituting an assignment involves the assignment of simple contract rights not associated commercially with particular documents, without consideration. Professor Corbin's argument has finally toppled some of the resistance in the reviewer's mind, going back to his law school days, against the general extension of power to make assignments without consideration.⁸ While the application of statutory provisions governing conveyances of real estate to grants of chattel interests by unsealed writings is debatable, the application of the same statutory provisions to assignments of contract rights by unsealed writings without consideration is still more debatable. Nevertheless even Professor Williston has now conceded this development in the law. It is not going much further to recognize the execution of assignments by the manipulation of writings not associated in commercial psychology with the obligations of which they are a record, writings which in terms of the *Restatement* need not be surrendered in enforcing an obligation, which are not—in the singularly crude language which was still used until recently in the Harvard Law School—the obligation itself. The manipulation of any clear writing may perform the functions of form, and it is possible that writings in the form of grants tend to be clearer than writings which look like the expressions of promises; while the manual transfer of the possession of papers recording obligations is on the whole so peculiar an occurrence as to have considerable evidentiary significance.

On the other hand the extension of this kind of argument to the written release of obligations in situations otherwise covered by the so-called rule in *Foakes v. Beer*⁹ presents peculiar difficulties. Here we are reminded not only of the evidentiary but of the precautionary functions of form. The tendency which Professor Corbin supports in other volumes¹⁰ to make a written

8. Compare Sharp, Book Review, 2 J. LEGAL EDUC. 235 (1949) (with somewhat confusing editorial footnotes).

9. L.R. 9 App. Cas. 605 (1884).

10. See § 175, p. 570 n.12, p. 572 n.15; §§ 1240-50.

unsealed instrument of release effective in these situations may be sound. Nevertheless the cases will remind us, as Professor Corbin reminds us in connection with a closely related theory of consideration,¹¹ that we are on the edge of distinctions as indispensable and as tenuous as those which are made in dealing with mistake. Perhaps the problems can be taken care of by extending the classification of duress at common law. Perhaps on the other hand the persistence of these and related difficulties will eventually lead to the development of a modern form suitable for the protection of parties under modern conditions, designed among other things to protect them against entering into some kinds of arrangements finally without getting into a lawyer's office. There are many possibilities, from the revival of the real common law seal, to forms like that suggested by the Uniform Written Obligations Act, to the solemn notarization used in some non-common law countries. While Professor Corbin may be right about the written assignment of the simple claim or the assignment by the manual transfer of any written record of an obligation, the reviewer is not ready to go further with him, nor even to follow what seems the course of his argument to a recognition of the written release, without urging again the need for serious attention to the problem of inventing a modern form.

Professor Corbin rightly criticizes the confusion of various meanings of contract which may appear in the observation that a contract is property. Nevertheless, the phrase is only an overly emphatic way of observing that, in his more exact terminology, many contract rights are important subjects of property. The need for care is illustrated in the present treatise, as elsewhere, by the discriminating treatment of agreements against assignment. Even after the abolition of imprisonment for debt, there continued to be some possible variation in attitude among debtors toward the various qualities of possible creditors, and the money debt—the most impersonal of obligations—might still represent a partly personal choice among money lenders. Here is one reason for not treating agreements against assignment simply like restraints on alienation; and another reason is the generally somewhat transitory character of contract rights. The rare eternal obligation, like the promissory obligation not to publish, is the exception that proves the rule. Contract obligations are generally of shorter duration, and after breach they are of course subject to the Statute of Limitations. They are in this respect quite unlike a fee simple interest in land or an absolute interest in a chattel. There are situations, moreover, where the administrative problems of the obligor, for example the large employer, are a peculiar justification for regulating or preventing assignments, for example wage assignments. Professor Corbin adopts the familiar position here outlined, and in doing so illustrates his point about the dangers of simplifying the relationship between contract rights and other subjects of property.

In spite of his caution Professor Corbin nevertheless accepts the doctrine of the cases in which a sense of the similarity between such physical objects as

11. See §§ 176-83.

land or cattle on the one hand and contract rights on the other has run riot. The cases involving chattels are bad enough, and their confusion of the subject, the thing, with an entitized "title" or "property" is worse. When the confusion is extended to abstract human relationships and interests in these relationships, it produces some of the most peculiar phenomena in the law.

In dealing with defenses and priorities Professor Corbin follows judiciously the sensible and judicious development of protection to the obligor against an assignee. He has, for example, a careful and persuasive treatment of the use of counter-claims by the obligor against a first or later assignee. He might indeed have said more about what seems a reasonable tendency, subject to doubt though it is on the authorities, to give effect to parties' undertakings that an obligor's defenses, or some of them, shall not be available against bona fide assignees for value. The tendency is related to the cases of apparent power to impair defenses, and conversely to the power of obligor and obligee to affect the assignee's rights by ordinary changes in the course of performance.

On the other hand, Professor Corbin's treatment of "latent equities," of the contest between the surety on a construction bond and a lender who takes an assignment of the contractor's rights after the creation of the suretyship relation, of successive assignees, and finally of the favored position of the assignee in his assignor's bankruptcy, can only be regarded—in a book otherwise so far advanced—as a tribute, perhaps involuntary, to the persistence of folklore in the law. It is true that the cases illustrate the familiar point that often any rule is better than none; but this of course does not mean that any rule is as good as any other.

Professor Corbin makes a skillful argument for the position about latent "title" equities taken by Chancellor Kent and defended in more sweeping form by Dean Ames; later abandoned and criticized by the faculty of the Harvard Law School; and now in turn expressed in the *Restatement*. He argues that there is much more authority in the cases for this position, that the latent equity does not prevail against the assignee, than most of the leading teachers in the field at the Harvard Law School have been willing to recognize. The reviewer has been forced to reconsider his own view on the matter, and he is inclined to think that more subclassifications than have been customary are needed to clarify discussion. What, for example, has such a case as *Matter of Holden*,¹² as explained in *Titus v. Wallick*,¹³ done to the New York law on the subject? What changes have been effected in the Pennsylvania law by *Maryland Casualty Co. v. National Bank of Germantown and Trust Co.*¹⁴ and *Lasser v. Philadelphia National Bank*?¹⁵ These cases, which are cited in the recent notes to Professor Williston's well known Section 438, deal with situations easily distinguishable from the situation supposed in the usual statement of any general rule. They probably do not change the New York

12. 271 N.Y. 212, 217, 2 N.E. 2d. 631, 633 (1936).

13. 306 U.S. 282, 290 (1939).

14. 320 Pa. 129, 182 Atl. 362 (1936).

15. 321 Pa. 189, 183 Atl. 791 (1936).

and Pennsylvania law, and unless New York and Pennsylvania can be depended on, it is hard to say that the weight of authority supports the *Restatement*.

Professor Corbin's argument that the priority of the surety on a construction bond in a simple contest with a lender assignee of the contractor's rights, who took his assignment after the execution of the suretyship contract, does not represent the triumph of a "latent equity," is an ingenious one. Nevertheless, it minimizes the difficulty which a banker might have as an original matter, in view of the confusion which good courts have shown about the question, in determining the time of origin of a surety's claim. It has at best less pragmatic significance than one tends to look for in the arguments of this very practical lawyer.

Professor Corbin accepts the priority of the surety, along with the priority of the earlier among successive assignees, without criticism. He recognizes indeed that there is something to be said for jurisdictions preferring the assignee who first notifies the debtor, and observes that there is room for the influence of apparent power in dealing with the competing claims of successive assignees. He might well give more critical attention than he does to the problem of rival claims to rights expressed in instruments which, though not "negotiable," are psychologically associated with the rights themselves. He does not seem troubled at any point by the practice of courts—whether in preferring the later claimant, as in some of the cases dealing with latent equities or in cases where possession of an instrument creates power effectively to assign, or in preferring the earlier claimant, as in cases of surety and assignee or assignee and assignee—to give one or the other the whole "thing."

He does not even seem particularly interested in the fascinating fluctuations in recent years in legislation dealing with the priorities of assignees and related holders of unpublicized security interests, in bankruptcy. He records the history briefly, and yet for a man of Professor Corbin's temperament, the whole episode might well have had a peculiar fascination. The Chandler Act probably went further than the Supreme Court had occasion to carry it in abolishing the priorities of persons who had taken assignments of simple contract rights as security for loans. In states where apparent authority or any of Dean Ames' (and the *Restatement's*) four specified conditions could give a second assignee a favored position, the first assignment seemed vulnerable under that Act. Large and influential groups of lenders were seriously affected. On discovering their position, they first secured the enactment of a variety of more or less effectively drawn protective "validating" statutes in the states. They then secured an amendment to the Chandler Act. We are now as a result in need of legislation going at least as far as those sections of the proposed Uniform Commercial Code requiring notice filing by lenders in most cases, to give them security interests in assigned claims protected against other assignees and lien creditors. The Code does not apply to assignments of a relatively small, casual and unsystematic sort (or to non-financing assignments or certain sub-assignments) and it would seem that it

should be supplemented by a return to the Chandler Act provisions, clarified and strengthened, made applicable at least to most assignments not complying with the provisions of the Commercial Code.

For what can be said in favor of the priority of an assignment over a "latent equity" or of a prior assignment over a later one? Whether one chooses the earlier or later claim for priority, his position is equally questionable. The case of successive assignees is commonly the simplest possible case of two equally simple minded or equally shrewd lenders tricked by a skillful or newly desperate borrower. The earlier assignee would have been prudent to protect himself from transactions between the debtor and assignor by notifying the debtor; and if he has not done so in some states he is subordinated to a later assignee who does notify the debtor. This is indeed an exceedingly crude imitation of a requirement of record or notice filing, and it is not the rule in most states. In a majority of states, it may be said that the assignor borrower is perhaps likely to be in a more desperate condition when he approaches the second assignee than he was when he approached the first; and the second assignee might be expected to detect signs of his condition. Moreover, by asking for a credit report, a second assignee can not infrequently protect himself. The rule is not however based on any such problematical but arguably sensible basis; nor subject to the qualifications which would be appropriate if it were.

As Professor Corbin says, "By the first assignment, the right became" the first assignee's, "so that at the time of the second assignment, the assignor had no right and could therefore transfer none."¹⁶ Such a statement could hardly satisfy Professor Corbin in his more skeptical moods. It is a case where an entity is used simply to beg a question. There seems to be in fact in the type case no reason to prefer one assignee to the other; both are equally the victims of a wrong-doer. The principle of equal treatment for equals requires that they should divide the claim,¹⁷ and in an inconceivably systematic society transaction or income tax financed insurance should perhaps take care of them both.

This suggestion is doubtless fanciful, but it may lead toward a sensible solution of the practical problem of priorities in bankruptcy. The economic and business justifications for such a priority in favor of the holder of an unpublicized security interest seem extremely dubious. It is sometimes said to be peculiarly desirable for a business in difficulties to be able to use all its assets, including contract rights, as security for needed credit advances. But

16. § 902, pp. 615-6.

17. See Jenks, *The Legal Estate*, 24 L.Q. REV. 147, 155 (1908); Radin's review of Harvey's stimulating *The Victims of Fraud*, in 21 CALIF. L. REV. 293, 294 (1933); LEWELLYN, *THE BRAMBLE BUSH* 143 (1951 ed.); Corbin, *Frustration of Contract in the United States of America*, 29 J. COMP. LEG. AND INT'L. L. 1, 8 (1947); Note, 18 U. OF CHI. L. REV. 153 (1950). The interesting problem of the liability of successive faultless converters of subject matter with fluctuating value may be dealt with by providing for contribution, by original owner and solvent converters alike, in fractions determined by the ratio between a value at the time of conversion (say sale) and total values at different conversions. Compare Note, 7 U. OF CHI. L. REV. 497, 518 n.92 (1940).

in view of the course of industrial fluctuations a business is about as likely to be going down as up. Advances of credit under the circumstances supposed are not such as to encourage reasonable caution about business prospects by the lender nor even by the borrower. Comparable arguments in favor of everyday practices by ordinary thriving businesses raise similar considerations in varying forms. The use of contract rights as security is legitimate enough, but not so imperative as to justify unpublicized priorities.

It is said that the estate is enriched by the credit advance, so the general creditors should not object to a priority. But their advances have also enriched the estate, and they will have had, in the circumstances supposed, no reason to expect a priority. In some cases they may even be actively misled, as where small creditors depend on the existence of a profitable contract in course of performance by their debtor, and find that he has assigned money to become due as security for loans. In many cases indeed an intelligent use of credit statements will guard against harm. But this is not always so, and the pathological case will continue to require attention.

The priority in question seems as indefensible as all the other priorities given to lenders with unpublicized security interests, which have been over the course of history the delight of lawyers and judges, the despair of creditors, and the subjects of waves of legislation protecting purchasers and lien or general creditors, followed in turn by new ingenuities on the part of borrowers lenders, lawyers and judges alike.

Professor Corbin may well have felt justified in accepting the situation much as it is. He has attacked outmoded tradition where there was some prospect that it would yield, and he may have thought it wise and lawyer-like to accept the doctrines with which we are here concerned. They nevertheless present fascinating problems to the reviewer, who is bound to wonder about the nature of the devices which have escaped the attack of so critical an author. The analogies of land and cattle, and of titles to land and cattle, have produced a range of interests in obligations which exhibit in a striking light the authority devices of the private law. Here are the making of patterns and the attachment to them once made which have been examined, in various phases and departments of intellectual history, by that quizzical anti-Fascist, Pareto.¹⁸ Here also is the preoccupation with things and other entities, often at the expense of the human beings involved in the relationships under examination, which appears in extreme form, so the doctors tell us, in cases called obsessional. Here are the traces of influences appearing in infancy, and later as well, which lead us to excessive preoccupation with possessions and abstractions, at the expense of people.¹⁹ Here also one sees traces of a related disposition to find someone in a controversy definitely in the wrong. It may be difficult for the

18. His compatriots in Fascist days apparently overlooked his economic theories and his attachment to periods characterized by "combinations" rather than "group-persistences." In particular they must have overlooked the forceful irony of the last paragraph of *The Mind and Society*.

19. See FLUGEL, *MAN, MORALS AND SOCIETY* 107, 295-6 (1945); ISAACS, *CHILDHOOD AND AFTER* 38, 45 (1949).

detached observer to find any way to choose between successive assignees or the participants in ancient wars, but those concerned, including judges, tend always to look for someone who is more to blame than another. They say for example that he who made the loss possible must bear it, but this is sometimes the person who leaves a chattel with a trustworthy bailee and sometimes, more commonly, the buyer from the bailee; sometimes the first assignee who fails to notify the debtor, sometimes, more commonly, the second assignee, who may have in fact no readily available way of protecting himself.

Fortunately the curious psychology of entity bound thinking carries in normal people its own correction. Professor Corbin's treatment of third party contracts and joint rights and duties reminds us of the tendency of shrewd and well balanced judges to look closely at the human relationships with which they must deal, however special their vocabulary sometimes may be. The law of negotiable paper which at first sight might seem to be here in question, has in fact its own well ordered and human good sense. It is fortunate that people like Professor Corbin who have worked constructively in all these fields have left to their successors the fascinating task of making more rational the treatment of equally deserving people caught in a common financial disaster.

IV

Volume Four contains the beginning of a new major Part of the treatise, not closely related to the Part which has been under discussion and not concluded until the following volume. This Part is headed "Breach of Contract—Judicial Remedies." The two chapters of the Part included in the present volume are: "Varieties of Breach—Partial, Total" and "Breach of Contract by Anticipatory Repudiation."

The first of these chapters has a useful discussion of the distinction between total breach and partial breach. A more original and stimulating group of sections deals with the rule against "splitting a cause of action" particularly in its application to "continuing" contracts including contracts of employment. Professor Corbin's argument is for a sensible and flexible application of the general procedural "rule."

The principles governing "total breach" as an excuse, the "rule" limiting the splitting of a cause of action, and the "rule" as to avoidable consequences seem all to affect, however illogically, the limits on the recognition of repudiation wholly in advance of the time for performance as having the effects of breach of contract. The requirement that the repudiation be relatively clear-cut, whether it is by language or by other act, and the power of retracting the repudiation, are indications of the peculiar characteristics of the repudiation as a basis for liability.

Professor Corbin is disposed, on the other hand, to emphasize the quite defensible view that a repudiation is in fact so serious an interference with the dependability of expectations created by a promise, at least by an enforceable one, that its resemblance to ordinary breach of contract is more significant than its difference. He argues furthermore for the disentangling of the

doctrine from the influence of what may have been some of its sources, the doctrines which we have just observed about excuse, splitting, and mitigation of damages. He argues strongly, to the reviewer's mind unanswerably, for the extension of liability for anticipatory repudiation to all types of contracts.

In connection with one interesting set of problems usually involving both present breach and anticipatory repudiation, Professor Corbin anticipates the flexible treatment of problems of remedy which he carries forward in Volume Five. It has been observed both by other writers and by courts that the treatment of the recovery of the insured in case of "total" and "permanent" disability under a disability insurance policy is introducing a new principle among the principles governing the relationship between what have been called "legal" and "equitable" remedies in our system. As in the case of the recovery by the promisee who has secured the promisor's indefeasible obligation to a donee beneficiary, the "legal" remedy in the case of total and permanent disability is at best clumsy and ineffective to give a sure equivalent of performance. Under these circumstances, and perhaps in a considerable range of "splitting" problems, it will be increasingly recognized by courts that recovery of damages should be refused while a decree for specific performance may be granted. As this evolution proceeds, it may be expected to develop a flexible attitude toward available remedies generally. Subject to whatever safeguards about jury trial may be thought necessary, courts will increasingly feel free to apply whatever remedy will most effectively protect the security of transactions, which is the leading concern of contract law.

The readable character of Professor Corbin's treatise is one significant feature of a group of related qualities. They include a sense of form and motion, of stability and growth, which pervades the whole work. There is shrewd but quiet criticism of points of current doctrine, together with respect for others' views, and for the law as it is. To one who does not know the author, the book conveys the impression of someone who combines to a marked degree the qualities of urbanity and vitality.

MALCOLM SHARP†

VOLUME FIVE

PART VI: BREACH OF CONTRACT—JUDICIAL REMEDIES §§ 990-1227.

I COUNT it an honor and a privilege to be asked to review a volume of *Corbin on Contracts*. And I am especially pleased that the assignment is of my favorite Volume, number Five, dealing with Remedies.

It seems to me that I can claim some sort of at least avuncular or nepotal relationship to the work. When, as a student, I watched with bated breath the offeree desperately trying to reach the top of the flag pole in time, I knew, as we all did then, that he—or at least some lineal descendant—was eventually to be captured in book form. By the time I joined the Yale faculty, over

†Professor of Law, University of Chicago.